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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 THE INSTITUTE OF CETACEAN
11 RESEARCH, et al.,

12 Plaintiffs,

13 v.

14 SEA SHEPHERD CONSERVATION
15 SOCIETY, et al.,

Defendants.

CASE NO. C11-2043JLR

ORDER ON MOTION FOR
SANCTIONS

16 SEA SHEPHERD CONSERVATION
17 SOCIETY,

18 Counterplaintiff,

19 v.

20 THE INSTITUTE OF CETACEAN
21 RESEARCH, et al.,

22 Counterdefendants.

I. INTRODUCTION

This matter comes before the court on Plaintiffs The Institute of Cetacean Research and Kyodo Senpaku Kaisha, Ltd.’s (collectively, “the Institute”) motion for remedial sanctions. (Mot. (Dkt. # 214).) The Institute brings this motion against Defendants Sea Shepherd Conservation Society (“Sea Shepherd US”) and Paul Watson, as well as against non-parties Lani Blazier, Marnie Gaede, Bob Talbot, Robert Winter, Ben Zuckerman, and Peter Reiman (“the Former Directors”). Having considered the submissions of the parties, the balance of the record, and the relevant law, and deeming oral argument unnecessary, the court GRANTS in part and DENIES in part the motion.

II. BACKGROUND

The underlying facts are set forth in detail in this court’s and the Ninth Circuit’s prior orders. *See Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y (Cetacean I)*, 725 F.3d 940 (9th Cir. 2013) (preliminary injunction order); *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y (Cetacean II)*, 774 F.3d 935 (9th Cir. 2014) (contempt order); *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*, No. 12-35266 (9th Cir.) Dkt. # 314 [hereinafter R&R]. Accordingly, the court summarizes them only briefly here.

The Institute comprises (1) a Japanese research foundation that receives permits from the Japanese government authorizing it to take whales for research purposes, and (2) the Japanese corporation that owns and crews the whaling ships utilized in the research endeavors. (R&R at 4.) Sea Shepherd US, a nonprofit organization based in the state of Washington, is part of a loosely organized conservation movement whose stated goal is

1 to “defend, conserve, and protect the world’s marine wildlife species.” (*Id.* at 3.) This
2 movement includes entities, also bearing the “Sea Shepherd” name, organized and
3 governed under the laws of other jurisdictions, such as Australia, Belgium, and France.
4 (*Id.*) Each of these entities has its own board of directors and separate bank accounts.
5 (*Id.* at 3-4.) For years, the Sea Shepherd movement, led by Sea Shepherd US, has
6 mounted a yearly campaign seeking to prevent the Institute from killing whales in the
7 Southern Ocean. (*Id.* at 4.) During this campaign, vessels owned and crewed by the Sea
8 Shepherd movement have engaged in various forms of direct interference with the
9 Institute’s ships. (*Id.* at 5.)

10 Seeking to put an end to the interference, the Institute filed suit against Sea
11 Shepherd US and its founder and Executive Director, Paul Watson, in this district court in
12 late 2011. (Compl. (Dkt. # 1).) The Institute moved for a preliminary injunction, which
13 the district court denied. *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc.*,
14 860 F. Supp. 2d 1216 (W.D. Wash. 2012). Pending a ruling on appeal, the Ninth Circuit
15 issued the following preliminary injunction in December, 2012:

16 Defendants Sea Shepherd Conservation Society and Paul Watson, and any
17 party acting in concert with them (collectively “defendants”), are enjoined
18 from physically attacking any vessel engaged by Plaintiffs the Institute of
19 Cetacean Research, Kyodo Senpaku Kaisha, Ltd., Tomoyuki Ogawa or
20 Toshiyuki Miura in the Southern Ocean or any person on any such vessel
(collectively “plaintiffs”), or from navigating in a manner that is likely to
endanger the safe navigation of any such vessel. In no event shall
defendants approach plaintiffs any closer than 500 yards when defendants
are navigating on the open sea.

21 (Injunction (Dkt. # 118).)
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1 When the Institute claimed that Sea Shepherd US, Mr. Watson, and Sea
2 Shepherd's then-board of volunteer directors (the Former Directors) were violating the
3 Ninth Circuit's preliminary injunction, the Ninth Circuit referred the resulting contempt
4 proceedings to the Appellate Commissioner ("Commissioner"). (Dkt. # 133.) The Ninth
5 Circuit then reversed the district court's denial of a preliminary injunction and remanded
6 the case. *Cetacean I*, 725 F.3d at 947; (Dkt. # 150 (mandate).) In doing so, the Ninth
7 Circuit provided that its preliminary injunction would "remain in effect until further order
8 of [the Ninth Circuit]." *Cetacean I*, 725 F.3d at 947.

9 After an eight-day trial on the Institute's motion for contempt, the Commissioner
10 issued a Report and Recommendation detailing the actions Sea Shepherd US, Mr.
11 Watson, and the Former Directors undertook during the 2012-13 whaling season after the
12 Ninth Circuit issued its injunction. (*See R&R.*) In short, Sea Shepherd US's board
13 enacted a "separation strategy." (*See generally id.*) Pursuant to this strategy, Sea
14 Shepherd US ceded control of the 2012-13 interference campaign, which it had
15 previously taken the lead logistical role in coordinating, to Sea Shepherd Australia
16 Limited ("Sea Shepherd Australia"), and otherwise severed ties to the campaign. (*See*
17 *generally id.*) In doing so, Sea Shepherd US granted its partial interest in one ship (the
18 *Bob Barker*) slated to be used in the 2012-13 campaign, as well as certain equipment on
19 other ships, to foreign Sea Shepherd entities. (*See generally id.*) Sea Shepherd Australia,
20 which viewed itself beyond the reach of the Ninth Circuit's injunction, conducted the
21 2012-13 campaign with little, if any, regard for the injunction. (*See generally id.*) As a
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1 result, Sea Shepherd Australia's ships breached the 500-yard perimeter on multiple
2 occasions. (*See generally id.*)

3 The Commissioner found that Sea Shepherd US and the Former Directors had not
4 violated the express terms of the Ninth Circuit's injunction: they had not physically
5 attacked any whaling vessel, engaged in navigation that endangered the safety of a
6 whaling vessel, or approached within 500 yards of a whaling vessel on the open sea. (*See*
7 *generally id.*; Injunction.) The Commissioner further concluded that the "separation
8 strategy" was a good faith effort to comply with the Ninth Circuit's injunction, and that
9 Sea Shepherd US could not be held liable for Sea Shepherd Australia's actions on the
10 open sea during the campaign. (*See generally* R&R.) Accordingly, the Commissioner
11 recommended denying the Institute's motion for a finding of contempt. (*See generally*
12 *id.*)

13 On review, the Ninth Circuit disagreed with the Commissioner's legal
14 conclusions. *See Cetacean II*, 774 F.3d at 944 ("We need not resolve which standard of
15 review applies to the Commissioner's findings of fact because our decision rests on
16 grounds the Commissioner incorrectly rejected because of errors of law."). The Ninth
17 Circuit did not disturb the Commissioner's finding that Sea Shepherd US and the Former
18 Directors had not violated the strict letter of the injunction. *Id.* at 949. Rather, the Ninth
19 Circuit found that Sea Shepherd US had "thwarted" the Ninth Circuit's "objective" in
20 issuing the injunction. *Id.* Specifically, the Ninth Circuit found that the separation
21 strategy "effectively nullified [the Ninth Circuit's] injunction" because Sea Shepherd US
22 allowed Sea Shepherd Australia to assume control of the 2012-13 campaign and

1 continued to provide “financial and other support for the campaign . . . by, among other
2 things, transferring for no consideration a vessel and equipment worth millions of
3 dollars.” *Id.* at 945.

4 The Ninth Circuit ruled as a matter of law that “a party may be held in contempt
5 for giving a non-party the means to violate an injunction, if the party knows it is highly
6 likely the non-party will use those means to violate the injunction.” *Id.* at 948. Applying
7 that rule, the Ninth Circuit held Sea Shepherd US in contempt because “Sea Shepherd
8 US’s separation strategy aided and abetted Sea Shepherd Australia and other Sea
9 Shepherd entities to perform acts that would have violated the injunction if done by
10 parties bound by it.” *Id.* at 945.

11 The Ninth Circuit further held the Former Directors in contempt in their capacities
12 as Sea Shepherd US board members because they voted to ratify the “separation strategy”
13 and the grant of the *Bob Barker* and other equipment. *Id.* at 955. Finally, the Ninth
14 Circuit held Mr. Watson personally in contempt because he was present on one of the Sea
15 Shepherd Australia ships that came within the 500-yard perimeter of the Institute’s
16 whaling vessels during the 2012-13 campaign. *Id.* at 957-58.

17 The Ninth Circuit referred the Institute’s request for compensatory damages and
18 attorneys’ fees to the Commissioner. *Id.* at 959. The Ninth Circuit, however, directed the
19 Institute’s request for coercive sanctions to the district court. *Id.* (“While we retain
20 jurisdiction to order remedial relief for acts of contempt that took place prior to the
21 issuance of our mandate, because these coercive sanctions are forward-looking, we
22 believe that policing the Defendants’ continuing compliance with the preliminary

1 injunction is better left to the district court.”) Consistent with that direction, the Institute
2 has moved for entry of coercive sanction against Defendants Sea Shepherd US and Mr.
3 Watson, as well as against the Former Directors. (*See* Mot.)

4 Specifically, the Institute asks the court to impose on each Former Director a
5 suspended fine of \$500,000.00, payable to the court immediately if the Former Director
6 violates the Ninth Circuit’s injunction. (Mot. at 3-4.) The Institute also asks the court to
7 impose on each Sea Shepherd US and Mr. Watson a suspended fine of \$2,000,000.00,
8 payable to the court immediately if the respective party (a) violates the Ninth Circuit’s
9 injunction; (b) encourages, supports, induces, or incites others to violate the Ninth
10 Circuit’s injunction; or (c) does not exercise good faith efforts (including initiating
11 litigation) to secure control and possession of the four ships (namely, the *Bob Barker*,
12 *Brigitte Bardot*, *Sam Simon*, and *Steve Irwin*) and respective ancillary equipment used by
13 Sea Shepherd Australia during the 2012-13 campaign. The Institute’s motion for
14 coercive sanctions is now before the court.

15 III. ANALYSIS

16 A. Legal Standard

17 Unlike punitive criminal sanctions, sanctions for civil contempt are purely
18 remedial. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 514 (9th Cir. 1992).
19 Therefore, civil sanctions may be imposed for only two purposes: (1) to coerce
20 compliance with a court order, or (2) to compensate the party pursuing the contempt
21 action for injuries sustained due to the contempt. *United States v. United Mine Workers*
22 *of Am.*, 330 U.S. 258, 303-04 (1947); *Gen. Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376,

1 1380 (9th Cir. 1986); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778
2 (9th Cir. 1983). Because the Ninth Circuit has retained jurisdiction over questions of
3 compensatory relief, only coercive sanctions are at issue here. *Cetacean II*, 774 F.3d at
4 959.

5 Coercive sanctions “are, by their very nature, conditional sanctions; they only
6 operate if and when the person found in contempt violates the order in the future.”
7 *Whittaker Corp.*, 953 F.2d at 517. Accordingly, “sanctions imposed in civil contempt
8 proceedings must always give to the alleged contemnor the opportunity to bring himself
9 into compliance, the sanction cannot be one that does not come to an end when he repents
10 his past conduct and purges himself.” *Id.* at 518; *see also Int’l Union, United Mine*
11 *Workers of Am. v. Bagwell*, 512 U.S. 821, 829 (1994) (“Where a fine is not
12 compensatory, it is civil only if the contemnor is afforded an opportunity to purge.”).
13 The Supreme Court has identified two acceptable types of fines for civil contempt: (1)
14 per diem fines imposed each day a contemnor fails to comply with an affirmative court
15 order, and (2) fixed fines suspended pending future compliance with a court order.
16 *Bagwell*, 512 U.S. at 829-30 (citing *United Mine Workers of Am.*, 330 U.S. at 303-04 as
17 an example of a permissible civil suspended fine); *see United Mine Workers of Am.*, 330
18 U.S. at 303-04 (suspending a civil contempt fine for 30 days to provide the contemnor an
19 opportunity to fully comply with the temporary restraining order).

20 In determining whether to levy a coercive sanction, a court “should weigh all the
21 evidence properly before it determines whether or not there is actually a present ability to
22 obey and whether failure to do so constitutes deliberate defiance or willful disobedience

1 which a coercive sanction will break.” *Falstaff Brewing*, 702 F.2d at 781. The court
 2 must “consider the character and magnitude of the harm threatened by continued
 3 contumacy, and the probable effectiveness of any suggested sanction in bringing about
 4 the result desired.” *Gen. Signal Corp.*, 787 F.2d at 1380 (quoting *United Mine Workers*
 5 *of Am.*, 330 U.S. at 303-04). “Generally, the minimum sanction necessary to obtain
 6 compliance is to be imposed.” *Whittaker Corp.*, 953 F.2d at 514.

7 **B. Non-parties**

8 The Institute’s motion for coercive sanctions against the Former Directors is not
 9 well taken. First, the Former Directors are not parties to this suit. (*See* Compl.; Am.
 10 Compl. (Dkt. # 234).) Second, the Former Directors are no longer in a position to direct
 11 the activities of Sea Shepherd US. The Ninth Circuit held the Former Directors in
 12 contempt only for their role in managing Sea Shepherd US. *Cetacean II*, 744 F.3d at
 13 955-56. As the Institute concedes, however, the Former Directors have all resigned from
 14 their positions on the board of Sea Shepherd US. (Mot. at 6.) The Institute puts forth no
 15 evidence showing that they have any current involvement with Sea Shepherd US
 16 activities. (*See* Mot.; Reply (Dkt. # 224).) As such, the court does not find there is any
 17 threat of “continued contumacy,” *Gen. Signal Corp.*, 787 F.2d at 1380, or “deliberate
 18 disobedience,” *Falstaff Brewing*, 702 F.2d at 781, by the Former Directors. Moreover, to
 19 the extent there is such a threat by Sea Shepherd US, *see infra* Section III.C.4, the
 20 probable effectiveness of a sanction against the Former Directors is minimal, as there is
 21 no evidence or suggestion that the Former Directors currently have any influence on Sea
 22 Shepherd US’s activities. *See Gen. Signal Corp.*, 787 F.2d at 1380.

1 The Institute's sole argument in support of its requested sanctions is that the
2 Former Directors are "physically capable" of complying with the Ninth Circuit's
3 injunction. (Mot. at 6.) "Physical capability" is not the standard for imposing coercive
4 sanctions. *See, e.g., Gen. Signal Corp.*, 787 F.2d at 1380; *Whittaker Corp.*, 953 F.2d at
5 517. There is simply no indication that the Former Directors will not in fact comply with
6 the Ninth Circuit's injunction going forward. Accordingly, the court declines to impose
7 coercive sanctions on the Former Directors.

8 **C. Defendants**

9 With respect to Sea Shepherd US and Mr. Watson, the court finds that the
10 Institute's requested sanctions are inappropriate because they either (1) seek to coerce
11 behavior beyond the scope of the Ninth Circuit's injunction or (2) impose excessive fines.
12 As discussed below, however, court concludes that lesser sanctions are appropriate.

13 **1. Encouragement**

14 The Institute requests suspended fines of \$2 million to prevent Sea Shepherd US
15 and Mr. Watson from "encouraging, supporting, inducing, or inciting others to violate the
16 [i]njunction." (Mot. at 3, 11.) The Institute, however, fails to establish that the range of
17 actions encompassed by this condition violates the Ninth Circuit's injunction. The Ninth
18 Circuit held Defendants in contempt for providing "material" support to the 2012-13
19 campaign. *Cetacean II*, 774 F.3d at 947, 952, 955. In so holding, the Ninth Circuit
20 emphasized that the material support from Sea Shepherd US both actually and
21 proximately caused acts by other Sea Shepherd entities that would have violated the
22 Ninth Circuit's injunction had those parties been so bound. *Id.* at 26-33. However, not

1 all acts of “encouragement” or “support” would meet that standard. Moreover,
2 prohibiting any and all expressions of “encouragement” and “support” may implicate
3 First Amendment free speech issues. *See Brandenburg v. Ohio*, 395 U.S. 444, 447
4 (1969); *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*,
5 290 F.3d 1058, 1062 (9th Cir. 2002), *as amended* (July 10, 2002).

6 Coercive sanctions “are, by their very nature, conditional sanctions; they only
7 operate if and when the person found in contempt violates the order in the future.”
8 *Whittaker Corp.*, 953 F.2d at 517. The court will not impose suspended sanctions that
9 can be triggered by actions that do not violate the Ninth Circuit’s preliminary injunction.
10 Because the Institute’s condition is overbroad, the court declines to impose suspended
11 fines prohibiting Defendants from “encouraging, supporting, inducing, or inciting others
12 to violate the [i]njunction.” (*See Mot.* at 3, 11.)

13 **2. Previously granted ships**

14 For the same reason, the court declines to impose suspended fines requiring
15 Defendants to attempt to secure control and possession over the three ships that Sea
16 Shepherd US granted to foreign Sea Shepherd entities before the Ninth Circuit issued its
17 injunction. (*See Mot.* at 3; *Reply* at 5.) Sea Shepherd US granted the *Brigitte Bardot* to
18 Sea Shepherd Australia in December 2010, granted the *Sam Simon* to Sea Shepherd
19 Australia in October 2012, and executed a deed of transfer of the *Steve Irwin* to Sea
20 Shepherd Netherlands in March 2012. (Neupert Decl. (Dkt. # 215) Exs. 4-6 (grant and
21 transfer agreements).) It goes without saying that because these grants predate the Ninth
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1 Circuit's December 2012 injunction, they cannot form the basis for a finding of
2 contempt.

3 Neither is it a basis for contempt that Sea Shepherd US has not tried to wrest
4 control and possession of those ships from their legal owners. The Ninth Circuit
5 predicated its contempt finding on Sea Shepherd US's post-injunction grants of a vessel
6 interest and equipment. *See Cetacean II*, 774 F.3d at 947 ("Our decision is primarily
7 compelled instead by the undisputed evidence . . . that Sea Shepherd US continued to
8 provide material support . . . after the injunction issued . . ."). The Ninth Circuit did not
9 suggest that Sea Shepherd was also required to affirmatively revoke or undo all of the
10 support it had furnished prior to the injunction. *See generally id.* In fact, the Ninth
11 Circuit made no mention of the grants of these vessels in its opinion. *See generally id.*
12 The court is disinclined to impose sanctions for conduct that the Ninth Circuit, when
13 presented with the opportunity, did not identify as a violation of its own injunction. *See*
14 *Whittaker Corp.*, 953 F.2d at 517.

15 The court also declines to issue its own finding that Sea Shepherd US's failure to
16 attempt to revoke previous grants constitutes contempt. "Civil contempt . . . consists of a
17 party's disobedience to a specific and definite court order by failure to take all reasonable
18 steps within the party's power to comply." *Cetacean II*, 774 F.3d at 945 (quoting *In re*
19 *Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993)).
20 As discussed below, there is no indication that Sea Shepherd has any legal basis to assert
21 control or possession over the three ships it previously granted to foreign entities. *See*
22 *infra* Section III.C.3. As such, any attempt to do so is not a "reasonable step" required by

1 the Ninth Circuit's injunction. *See In re Dual-Deck Video Cassette Recorder Antitrust*
2 *Litig.*, 10 F.3d at 695.

3 The Institute's reliance on *In re Transamerica Corporation* is misplaced. (*See*
4 Reply at 5 (citing 184 F.2d 319, 322 (9th Cir. 1950)). In *Transamerica*, the Ninth Circuit
5 held that its injunction required a corporation to countermand pre-injunction orders
6 before its agents acted on them. *See In re Transamerica Corp.*, 184 F.2d at 322. In
7 doing so, however, the Ninth Circuit explicitly distinguished that requirement from a
8 requirement to take affirmative action to undo actions consummated prior to the
9 injunction. *See In re Transamerica Corp.*, 184 F.2d at 322 (“[O]bedience to such an
10 injunction necessarily requires that the prior orders be countermanded—that the agents be
11 instructed not to do that which they had previously been told to do. Such a countermand,
12 or reversal of instructions, is in no true sense the taking of affirmative action to undo
13 action previously taken. It is no more than an essential step in the process of
14 obedience.”). As such, *Transamerica* does not support the Institute's attempt to require
15 Sea Shepherd US to take affirmative action to undo actions previously taken.

16 Coercive sanctions, by their very nature, operate only if and when the person
17 found in contempt violates the order in the future. *Whittaker Corp.*, 953 F.2d at 517. The
18 Institute, however, seeks to predicate coercive sanctions on behavior that does not violate
19 the Ninth Circuit's injunction. Therefore, the court declines to impose suspended fines
20 requiring Defendants to attempt to secure control and possession over the three ships that

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1 Sea Shepherd US granted to foreign Sea Shepherd entities before the Ninth Circuit
2 issued its injunction.

3 **3. Subsequently granted ship and equipment**

4 The Institute's request for suspended fines requiring Defendants to attempt to
5 secure control and possession over the vessel and equipment subject to Sea Shepherd
6 US's post-injunction grants presents a slightly different question. (*See* Mot. at 3); *see*
7 *also In re Transamerica Corp.*, 184 F.2d at 326 (requiring a contemnor to unwind post-
8 injunctions acquisitions). Nonetheless, the court concludes that coercive sanctions are
9 inappropriate for the following reasons.

10 The grants vest legal ownership of the respective ships and equipment in foreign
11 Sea Shepherd entities. (*See* Neupert Decl. Exs. 1-6 (grant agreements).) As such, it is far
12 from clear that Sea Shepherd US has any legal basis for revoking the grants. (*See* R&R
13 at 25-26, 51, 70-71, 78-79.) The Institute makes much of the fact that five of the six
14 grants contain a "Return of Grant" provision. (*See* Mot. at 7-8.)¹ The Institute, however,
15 overlooks the fact that Sea Shepherd US's ability to invoke that provision is limited to
16 situations not present here.

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18 ¹ This analysis is equally applicable to the the pre-injunction grants of the *Brigitte Bardot* and
19 *Sam Simon*, which contain substantially similar revocation provisions. "The 2012 grant agreement for the
20 *Steve Irwin* is materially different, as it implemented a three-way exchange by which legal ownership was
21 transferred from Sea Shepherd United Kingdom to [Sea Shepherd Netherlands] with [Sea Shepherd US]
22 retaining beneficial ownership for tax purposes. There is no revocation clause, and the agreement vested
in [Sea Shepherd Netherlands] a right of ownership that is 'unconditional.'" R&R at 26 n.108; (*see also*
Neupert Decl. Ex. 6.) The Institute concedes it is "unable to identify" what Sea Shepherd US's residual
interest "means in this context" (Mot. at 10 n.5), and fails to otherwise put forth evidence showing that
Sea Shepherd US or Mr. Watson currently retain any control over the vessel (*see generally id.*).
Therefore, the court concludes that the legal basis for Sea Shepherd's revocation rights is just as tenuous
in the context of the *Steve Irwin* as it is in the context of the other vessels and equipment.

Specifically, the “Return of Grant” provisions state: “If the Equipment . . . is used or any other purposes than those outlines above, the Equipment must be promptly returned to [Sea Shepherd US] and/or financial compensation equivalent to the value of the Equipment . . . must be immediately paid . . . to [Sea Shepherd US].” (Neupert Decl. Ex. 1 at 2-3 (grant of equipment aboard the *Brigitte Bardot*), Ex. 2 at 2-3 (grant of equipment aboard the *Steve Irwin*), Ex. 3 at 2-3 (grant of the *Bob Barker* interest), Ex. 4 ¶ C, Ex. A (grant of the *Sam Simon*), Ex. 5 at 2-4 (grant of the *Brigitte Bardot*)). The grants state their purposes as following: “The purpose of this grant is to support [Sea Shepherd US’s] ongoing mission of global marine wildlife conservation. More specifically, the Equipment *must* be used by [Sea Shepherd Australia] to uphold [Sea Shepherd US’s] global mission to end the destruction of habitat and slaughter of wildlife in the world’s oceans in order to conserve and protect ecosystems and species.” (*Id.* Ex. 1 at 2-3, Ex. 2 at 2-3, Ex. 3 at 2-3, Ex. 4 ¶ C, Ex. A, Ex. 5 at 2-4.

There is, however, no indication that the vessels and equipment are not being used by their respective owners “to support [an] ongoing mission of global marine wildlife conservation.” (*See* R&R at 51.) Similarly, there is no indication that the Ninth Circuit’s injunction—or conduct contravening it—can form the basis for a revocation action against entities outside the jurisdiction of the injunction. (*See id.*) As such, it appears that any revocation action attempted by Sea Shepherd US would be futile.

The Institute’s arguments invoking United States tax law do not establish otherwise. (*See* Mot. at 8.) Whether Sea Shepherd US’s grants satisfy the tax requirements applicable to 501(c)(3) charitable organizations is irrelevant to the question

1 of legal ownership and control currently before the court. Moreover, the Institute fails to
2 explain how the court could realistically monitor or enforce Sea Shepherd US's "good
3 faith efforts" in any revocation litigation.

4 It is fundamental that a "court's power to impose coercive civil contempt depends
5 upon the ability of the contemnor to comply with the court's coercive order." *Falstaff*
6 *Brewing*, 702 F.2d at 778. Accordingly, the court concludes that instituting legal or other
7 proceedings to enforce the revocation rights in the post-injunction grants is not a
8 "reasonable step" required by the Ninth Circuit's injunction. *See In re Dual-Deck Video*
9 *Cassette Recorder Antitrust Litig.*, 10 F.3d at 695. Neither is it a practicable option for
10 "purging" Sea Shepherd's past contempt. *See Whittaker Corp.*, 953 F.2d at 517.

11 Therefore, the court declines to impose sanctions predicated on good faith attempts to
12 regain control or possession over the vessel and equipment transferred by post-injunction
13 grants.

14 **4. Compliance in general**

15 Finally, the court turns to the Institute's request for suspended fines of \$2 million,
16 payable to the court if Sea Shepherd US or Mr. Watson violates the stated terms of the
17 Ninth Circuit's injunction.

18 **a. Mr. Watson**

19 The court agrees that the threat of continued contumacy by Mr. Watson merits
20 coercive sanctions. Mr. Watson's recalcitrance during the course of this litigation is well
21 established:
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1 Unlike the other individual respondents, Watson was present in the
2 Southern Ocean aboard the *Steve Irwin* during the entire [2012-13]
3 campaign. Watson claimed to believe that he could stay on the *Steve Irwin*,
4 acting as an observer, and remain in compliance with the injunction.
5 Chakravarty, the captain of the *Steve Irwin*, assured Watson that the ship
6 would not approach within 500 yards of the whaling vessels. . . . This plan
proved unworkable in practice. Chakravarty abandoned the plan to transfer
Watson in mid-February when he and the other captains attempted a
blockade to prevent one of the Plaintiffs' vessels from refueling. As a result,
Watson personally came within 500 yards of the Plaintiffs' whaling vessel
while on board the *Steve Irwin*.

7 *See Cetacean II*, 774 F.3d at 957-58; *see also id.* at 941-43 (“There is evidence that
8 Watson was not a mere passive participant in [the 2012-13 campaign] after he resigned
9 his leadership positions. During the . . . campaign, Watson appeared by phone on a radio
10 show in March of 2013. His answers to questions posed during the show indicate that he
11 believed himself to be a participant in [the campaign], not just an observer. He said, for
12 instance, ‘we’re chasing the Japanese factory ship *Nisshin Maru* and keeping it from
13 killing whales.’ When asked about the atmosphere aboard the ship, Watson said, ‘Oh,
14 everybody’s very upbeat on our ship because we’ve managed to make sure they don’t kill
15 many whales this year.’”). Mr. Watson personally and intentionally violated the Ninth
16 Circuit’s injunction by breaching the 500-yard perimeter around the whaling ships. *See*
17 *id.* at 958. Mr. Watson has provided the court no assurances that he will cease such
18 “deliberate defiance” during the upcoming whaling season. *See Falstaff Brewing*, 702
19 F.2d at 781. Consequently, the court can only conclude that coercive sanctions are
20 necessary to ensure that Mr. Watson’s commitment to the Sea Shepherd movement does
21 not trump his commitment to obeying the Ninth Circuit’s injunction.
22

1 However, the Institute's requested fine of \$2 million is excessive. In fixing the
2 amount of a fine to be imposed as a means of securing future compliance, a court must
3 "consider the amount of defendant's financial resources and the consequent seriousness
4 of the burden to that particular defendant." *United Mine Workers of Am.*, 330 U.S. at
5 304. "Generally, the minimum sanction necessary to obtain compliance is to be
6 imposed." *Whittaker Corp.*, 953 F.2d at 514. The Institute makes no effort to show that
7 a sanction of \$2 million dollars is proportional to Mr. Watson's net worth; a sanction of
8 such magnitude would be a drastic blow to the financial resources of the vast majority of
9 individuals. Moreover, the court finds that such a sanction is not proportional to the
10 character and magnitude of the harm threatened by Mr. Watson's continued contumacy.
11 *See Gen. Signal Corp.*, 787 F.2d at 1380. Although the Institute posits grave harm from
12 continued interference campaigns in general (*see generally* Reply), that harm would not
13 stem from Mr. Watson's personal participation: after all, Sea Shepherd Australia's *Steve*
14 *Irwin* would have approached within 500 yard of the whaling vessel regardless of
15 whether Mr. Watson was on board.

16 In considering the amount of sanction to impose, the court is also mindful of the
17 Supreme Court's admonition that the fact that sanctions for future acts of contempt are
18 announced in advance is not necessarily enough to render the later imposition of such
19 sanctions coercive and civil. *See Bagwell*, 512 U.S. at 836-37. In *Bagwell*, the Supreme
20 Court held that court-imposed fines of \$100,000.00 per future violation were not a civil
21 sanction because they were "more closely analogous to fixed, determinate, retrospective
22 criminal fines which petitioners had no opportunity to purge once imposed," they

1 implicated “widespread, ongoing, out-of-court violations of a complex injunction,
2 effectively policing the union’s compliance with an entire code of conduct the court itself
3 imposed,” and “the fines assessed were serious.” *Id.* at 837. Consistent with that
4 opinion, courts have modified indefinite contempt sanctions to expire if the contemnor
5 repents its past conduct and commits to abiding by the injunction going forward. *See*
6 *Whittaker Corp.*, 953 F.2d at 518 (modifying a civil contempt sanction to state that it only
7 “remains in effect until [the contemnors] demonstrate to the satisfaction of the court that
8 they are able to and will comply with the provisions of the [court’s prior order]”); *New*
9 *York State Nat’l Org. for Women v. Terry*, 159 F.3d 86, 94 (2d Cir. 1998) (upholding
10 civil contempt sanctions because they included “a purge provision that excuses
11 defendants from paying contempt fines if, within 60 days from the date of the court’s
12 order, they file and publish an affirmation of their intent to abide by the Permanent
13 Injunction”).

14 Accordingly, the court imposes against Mr. Watson a lesser fine of \$5,000.00 for
15 each future act of contempt. The fine is payable to the court in the event Mr. Watson (1)
16 violates the express terms of the Ninth Circuit’s injunction (*see* Injunction), or (2) aids
17 and abets any entity in violating the Ninth Circuit’s injunction, *see Cetacean II*, 774 F.3d
18 at 952. Mr. Watson may purge himself of this suspended civil sanction by filing an
19 affidavit or declaration with the court within one month of the date of this order affirming
20 his intent to abide by the Ninth Circuit’s injunction as interpreted by the Ninth Circuit in
21 *Cetacean II*, 774 F.3d 935. *See Bagwell*, 512 U.S. at 836-37; *Whittaker Corp.*, 953 F.2d
22 at 518; *New York State Nat’l Org. for Women*, 159 F.3d at 94.

1 **b. Sea Shepherd US**

2 The court is less inclined to conclude that the threat of continued contumacy by
3 Sea Shepherd US merits coercive sanctions. Sea Shepherd US correctly points out that
4 its last contemptuous acts occurred over two years ago. (Resp. (Dkt. # 219) at 7.) As the
5 Institute has conceded, Sea Shepherd US had no involvement in Sea Shepherd's
6 subsequent interference campaigns. (R&R at 78.) Moreover, the Commissioner found
7 that Sea Shepherd US made a good faith effort to comply with the Ninth Circuit's
8 injunction during the 2012-13 campaign. (R&R at 55-62.)

9 The Ninth Circuit, however, called that finding into doubt: "Under the
10 circumstances, it is simply not credible that the volunteer directors believed they were
11 complying with the injunction" *Cetacean II*, 774 F.3d at 955. Additionally, counsel
12 for Sea Shepherd US have indicated to this court their client's desire to return to
13 mounting interference campaigns in the Southern Ocean. (*See* 4/16/14 Trans. (Dkt.
14 # 188-3) at 18:6-7, 25:19-25); *see also Cetacean II*, 744 F.3d at 949 (finding that Sea
15 Shepherd US facilitated donations for the 2012-13 campaign after the injunction issued).
16 Accordingly, the court concludes that coercive sanctions are necessary to ensure
17 compliance with the terms of the Ninth Circuit's injunction.

18 Once again, however, the Institute's requested amount of \$2 million is excessive.
19 There is no evidence concerning Sea Shepherd US's financial resources before the court.
20 *See Whittaker Corp.*, 953 F.2d at 514. Nonetheless, the court takes into account Sea
21 Shepherd's status as a non-profit, charitable organization. (*See* Mot. at 8.) The court also
22 concludes that, due to Sea Shepherd US's demonstrated commitment to avoiding

1 interacting with whaling vessels on the open sea, the character and magnitude of harm
2 posed by Sea Shepherd US's threatened contumacy is not substantial. *See Gen. Signal*
3 *Corp.*, 787 F.2d at 1380; *Cetacean II*, 774 F.3d at 949 (noting that Sea Shepherd US did
4 not violate the express terms of the Ninth Circuit's injunction).

5 Weighing these factors, the court concludes that the minimum sanction necessary
6 to coerce compliance is a suspended fine of \$10,000.00 per violation. *See Whittaker*
7 *Corp.*, 953 F.2d at 514. The fine is immediately payable to the court in the event Sea
8 Shepherd US (1) violates the express terms of the Ninth Circuit's injunction (*see*
9 Injunction), or (2) aids and abets any entity in violating the Ninth Circuit's injunction, *see*
10 *Cetacean II*, 774 F.3d at 952. Mindful of the teachings of *Bagwell* and *Whittaker*, the
11 court provides that Sea Shepherd US may purge itself of this suspended civil sanction by
12 filing an affidavit or declaration with the court within one month of the date of this order
13 affirming its intent to abide by the Ninth Circuit's injunction as interpreted by the Ninth
14 Circuit in *Cetacean II*, 774 F.3d 935. *See Bagwell*, 512 U.S. at 836-37; *Whittaker Corp.*,
15 953 F.2d at 518; *New York State Nat'l Org. for Women*, 159 F.3d at 94.

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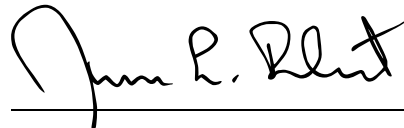
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1 **IV. CONCLUSION**

2 For the foregoing reasons, the court GRANTS in part and DENIES in part the
3 Institute's motion for coercive sanctions (Dkt. # 214). The court imposes suspended
4 fines against Mr. Watson and Sea Shepherd US in the amounts and pursuant to the terms
5 set forth above.

6 Dated this 4th day of June, 2015.

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10 JAMES L. ROBART
United States District Judge